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Evidence—*Riley v. City of Chester* and *United States v. Cuthbertson*: An Emerging Federal Common-Law Privilege for Confidential Sources

By 1972, the year in which the Supreme Court decided *Branzburg v. Hayes*,¹ it seemed settled that there existed no basis for an assertion by a journalist of a common-law privilege that might allow him to refuse to disclose the identity of a confidential informant.² The *Branzburg* decision clearly limited any first amendment privilege in these circumstances.³ Lower federal courts have attempted to define the nature of journalists' confidential-source privilege remaining after *Branzburg*, but always in terms of a privilege based on first amendment considerations.⁴ In 1979, however, the United States Court of Appeals for the Third Circuit in *Riley v. City of Chester*⁵ held that a qualified common-law privilege attached to a journalist testifying in a civil action.⁶ The same court a year later extended that common-law privilege to criminal actions in *United States v. Cuthbertson (Cuthbertson I)*.⁷

In *Riley* plaintiff, a city policeman running for mayor, brought a civil rights action⁸ in federal district court against the city, its mayor and its chief of police, seeking to enjoin them from interfering in his political campaign.⁹ During the hearing on the motion for a preliminary injunction, plaintiff submitted several newspaper articles that referred to official police investigations into his performance record.¹⁰ The author of one of these articles refused to divulge the identity of the person or persons from whom she had received the information printed, and she was cited by the court for contempt.¹¹ Subsequent witnesses in the proceedings indicated that the mayor had been a source of several of the stories leaked to the press.¹²

The court failed to issue a preliminary injunction but refused to dismiss the motion until the reporter's testimony was heard.¹³ The court of appeals,

1. 408 U.S. 665 (1972).

2. *Id.* at 685; D. Pember, *Mass Media Law* 293-94 (1977); 8 J. Wigmore, *Evidence* § 2285, at 527 (McNaughton rev. 1961). See generally M. Van Gerpen, *Privileged Communication and the Press: The Citizen's Right to Know Versus the Law's Right to Confidential News Source Evidence* 58-85 (1979); Annot., 7 A.L.R.3d 591 (1966).

3. See notes 65-75 and accompanying text *infra*.

4. See notes 76-91 and accompanying text *infra*.

5. 612 F.2d 708 (3d Cir. 1979).

6. *Id.* at 715.

7. 630 F.2d 139, 147 (3d Cir. 1980), cert. denied, 449 U.S. 1126 (1981).

8. Plaintiff brought his action under 28 U.S.C. § 1343 (Supp. III 1979) and 42 U.S.C. § 1983 (Supp. III 1979). 612 F.2d at 710.

9. Riley alleged that defendants were keeping his home under surveillance and were conducting "spurious investigations" into his performance as a policeman. 612 F.2d at 710.

10. These investigations took place prior to his campaign for mayor. *Id.* at 710-11.

11. *Id.* at 711.

12. The mayor himself testified to this effect. *Id.* at 712-13. The court noted that plaintiff's counsel did not ask police officials for names of persons who had access to plaintiff's personnel records, *id.* at 712, and did not make any attempt to call the chief of police as a witness. *Id.* at 713.

13. *Id.* at 713.

holding that a federal common-law privilege protected the reporter's refusal to name her sources,¹⁴ reversed the contempt citation.¹⁵

The court reasoned that under the Federal Rules of Evidence¹⁶ the federal courts had been charged with applying "the principles of the common law . . . interpreted . . . in the light of reason and experience"¹⁷ to determine questions of privilege.¹⁸ A review of the legislative history of the Federal Rules led the court to conclude that Congress had intended that the courts develop a rule to cover the journalist's privilege.¹⁹

The court found that the Supreme Court in *Branzburg v. Hayes*²⁰ had acknowledged that the first amendment protected news gathering, as well as news dissemination.²¹ The court reasoned that if a journalist could not protect the identity of his sources, his ability to obtain information would be affected, which in turn would adversely affect the press' ability to disseminate information. Because the first amendment was intended to protect the press in its role as a "vital source of public information,"²² the court concluded that the public policy supporting such a role compelled the result that a federal common-law privilege attaches to confidential sources.²³

In further support of this privilege, the court pointed to other federal decisions that authorized a journalist's privilege,²⁴ to Pennsylvania's "shield law"²⁵ and to Pennsylvania's public policy, expressed by the state supreme court,²⁶ of protecting reporters from having to reveal their sources.²⁷ The

14. *Id.* at 715.

15. *Id.* at 713.

16. Fed. R. Evid. 501.

17. 612 F.2d at 713 (quoting Fed. R. Evid. 501).

18. The courts, however, in deciding state law questions, must apply state laws of privilege. Fed. R. Evid. 501. The *Riley* case involved a federal question. 612 F.2d at 713-14.

19. 612 F.2d at 714. The court noted a comment by Representative Hungate, the principal drafter of the Federal Rules of Evidence:

For example, the Supreme Court's rule of evidence contained no rule of privilege for a newspaper-person. The language of Rule 501 permits the courts to develop a privilege for newspaperpeople on a case-by-case basis. The language cannot be interpreted as a congressional expression in favor of having no such privilege, nor can the conference action be interpreted as denying to newspaperpeople any protection they may have from State newperson's privilege laws.

Id. at 714 n.6. Cf. *Branzburg v. Hayes*, 408 U.S. 665, 709-10 (1972) (Powell, J., concurring) (apparently advocating a case-by-case approach to determine what information a journalist may be compelled to provide).

20. 408 U.S. 665 (1972).

21. 612 F.2d at 714. See also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 582 (1980) (Stevens, J., concurring).

22. 612 F.2d at 714.

23. *Id.* at 715. The competing public interest in grand jury proceedings, which required the reporters in *Branzburg* to testify, was not found present in *Riley*. *Id.* at 714.

24. E.g., *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973). These cases are discussed at notes 80-91 and accompanying text *infra*.

25. 53 Pa. Cons. Stat. Ann. § 5942 (Purdon 1981) (exempting reporters from revealing sources of information in any legal proceeding). The court noted that, as a federal court hearing a federal question, it was not bound by the law of the state in which the action had been filed. 612 F.2d at 715.

26. "[T]his public shield against governmental inefficiency, corruption and crime" can be

court explained, however, that the privilege is qualified and may be required to yield to other interests, making it necessary that the policies giving rise to the privilege and their applicability to the facts in issue be balanced against the need for the evidence sought to be obtained in the case at hand.²⁸

Distinguishing *Riley* from other cases in which first amendment considerations were forced to yield,²⁹ the opinion characterized the case as one in which a journalist without a personal stake in the outcome of the suit was called as a third-party witness by one of the interested parties.³⁰ The burden was on plaintiff to show why the information he sought was necessary to the maintenance of his suit. In order to do this, he was required to show that there was no other source from which the information could have been obtained³¹ and that the information sought was vital to his claim.³²

The trial court had taken these factors into account correctly but had determined incorrectly that the required showing had been met.³³ First, the record indicated that the information requested might have been obtained from other sources.³⁴ Second, the court found that the information sought relating to investigations of plaintiff completed before the election campaign was of little relevance to the case.³⁵ Finally, the court stated that the policy considerations connected with the first amendment "compel . . . restraint in the judicial imposition of sanctions on the press,"³⁶ and therefore, "trial courts should be cautious to avoid an unnecessary confrontation between the courts and the press."³⁷

In *Cuthbertson* *I*³⁸ the Third Circuit Court of Appeals extended the privilege to cover criminal as well as civil proceedings. The CBS news program *60*

preserved only if "newsmen are able to *fully and completely* protect the sources of their information." In re Taylor, 412 Pa. 32, 41, 193 A.2d 181, 185 (1963). Although "stemming from an independent base of authority," the "interests behind" Pennsylvania law and the federal common law, the protection of the press and the public's right to know, were said to be "congruent." 612 F.2d at 715.

27. 612 F.2d at 715.

28. Id. at 715-16. "When a privilege is grounded in constitutional policy, a 'demonstrated, specific need for evidence' must be shown before it can be overcome." Id. at 716 (citing *United States v. Nixon*, 418 U.S. 683 (1974)).

29. E.g., *Herbert v. Lando*, 441 U.S. 153 (1979) (journalist defendant in libel suit; plaintiff alleged "actual malice"); *New York Times Co. v. Jascavich*, 439 U.S. 1317 (1978) (White, J., in chambers) (criminal defendant sought information held by reporter to use in preparation of his defense); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (reporter alleged to possess evidence relevant to criminal investigation); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (reporter witness to events under grand jury investigation); *Anderson v. Nixon*, 444 F. Supp. 1195 (D.D.C. 1978) (reporter waived privilege by bringing suit).

30. 612 F.2d at 716.

31. Id. "All courts which have considered this issue have agreed [on this requirement]." Id.

32. Id. at 717.

33. Id.

34. Id. The court stated that the attempt to obtain the information from the reporter "should fail on this ground alone." Id.

35. Id. at 718.

36. Id. (quoting *United States v. Steelhammer*, 539 F.2d 373, 375 (4th Cir. 1976), discussed at note 195 *infra*).

37. 612 F.2d at 718.

38. 630 F.2d 139 (3d Cir. 1980).

Minutes had aired a report on a fast-food franchising operation that later was indicted for fraud and conspiracy by a grand jury. CBS was served by defendants with a subpoena duces tecum requesting all materials used in the preparation of the report.³⁹ The trial court, reasoning that it could not determine whether CBS's qualified privilege must give way to defendants' request, modified the subpoena to require CBS "to produce to the court for *in camera* inspection prior to trial all verbatim or substantially verbatim statements in CBS's possession made by persons named in the [government's] witness list."⁴⁰ CBS refused to comply with the subpoena and was fined one dollar per day while it remained in contempt of the order.⁴¹

The court of appeals, while ruling that the order for *in camera* review was proper,⁴² held that "journalists possess a qualified privilege not to divulge confidential sources and not to disclose unpublished information in their possession in criminal cases."⁴³ The court found that the subpoena requesting statements made by persons named on the government's witness list met the requirements of the Federal Rules of Criminal Procedure⁴⁴ because the material requested would be admissible for purposes of impeachment of those witnesses at trial, and therefore was subject to subpoena. Because the material would be used only when each witness testified, production to defendants would be proper only after such testimony. The subpoena in question, however, precluded any pretrial inspection by defendants, and an *in camera* review would enable the trial court to prepare for a ruling at the trial on the production of the statements to defendants, thus avoiding any delay of the trial.⁴⁵ Since the material would be subject to subpoena at trial under the Federal Rules of Criminal Procedure, the trial court could not be said to have abused its discretion in requiring pretrial production to expedite its decisions.⁴⁶

In determining whether the *Riley* qualified privilege attached in this case, the court found that the press's interest in protecting confidential sources was the same whether an action was civil or criminal, and that to adhere to the point of view that the journalist's privilege must always yield to sixth amendment considerations would be to assert that the first amendment must always yield to the sixth,⁴⁷ a view repudiated by the Supreme Court in *Nebraska Press Association v. Stuart*.⁴⁸ Although a defendant's sixth amendment right must

39. *Id.* at 142.

40. *Id.* at 143. A second subpoena, requiring production of statements made by named franchisees and potential franchisees for *in camera* review, was also issued, *id.*, but was found overbroad under Fed. R. Crim. P. 17(c) alone. *Id.* at 146.

41. 630 F.2d at 143.

42. *Id.* at 148-49.

43. *Id.* at 147.

44. Fed. R. Crim. P. 17(c).

45. 630 F.2d at 145.

46. *Id.* The second subpoena (see note 40 *supra*) failed to meet the "evidentiary material" test, set forth in *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951), and was found to be based on a mere hope of uncovering some exculpatory material. This mere hope was found insufficient to justify the use of Fed. R. Crim. P. 17(c). 630 F.2d at 145-46.

47. 630 F.2d at 147.

48. 427 U.S. 539, 561 (1976).

be considered in determining whether the privilege will yield, it does not preclude the existence of the privilege itself.⁴⁹

While *Riley* had addressed itself only to the question of the protection of the identities of confidential sources, the names of the witnesses in *Cuthbertson I* were known, and the government had obtained waivers from them allowing CBS to disclose their statements. The court held, however, that the policy that gives rise to the confidential-source privilege calls for some protection of a journalist's resource materials, and extended the privilege to the unpublished materials of CBS.⁵⁰ Additionally, it was pointed out that the privilege was held by CBS and, like the attorney-client privilege, could be waived only by its holder.⁵¹ The court, having established the privilege, noted that it could be overridden under certain circumstances but declined to delineate the factors that the district court should consider in the balancing process, confining itself only to the issue of the propriety of requiring production for *in camera* review.⁵² CBS argued that even *in camera* review places a burden on the press' exercise of its functions, that the court should not have required such production without a showing that the material could not be obtained from another source, and that the material sought was "centrally relevant" to their defense.⁵³ The court agreed that if the information could be obtained elsewhere the needs of both parties could be satisfied without requiring the district court "to make the delicate balance of interests required by the privilege."⁵⁴ Given the nature of the material sought,⁵⁵ however, the court found that defendants had made the necessary showing that the information was otherwise unavailable.⁵⁶

The court also reasoned that a showing of relevancy sufficient to meet rule 17(c) was sufficient "to justify production of privileged material . . . for *in camera* review," if the requisite showing of nonavailability was made.⁵⁷ The court declined to decide whether defendants would need to show a higher degree of relevance at the time of trial in order to compel production.⁵⁸

49. 630 F.2d at 147. In the later case of *United States v. Criden*, 633 F.2d 346, 355 (3d Cir. 1980), cert. denied sub nom. *Schaffer v. United States*, 449 U.S. 1113 (1981), the Third Circuit Court of Appeals again stressed that the journalist's privilege need not in all cases yield to a defendant's sixth (or fifth) amendment rights.

50. 630 F.2d at 147. The court pointed out, however, that the lack of a confidential source could be taken into account in the balancing process. *Id.*

51. *Id.* This was also restated in *United States v. Criden*, 633 F.2d at 359.

52. 630 F.2d at 148.

53. *Id.*

54. *Id.*

55. "[U]nique bits of evidence that are frozen at a particular place and time." *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 149. On remand, the district court ordered CBS to turn over more material which it had determined to be of exculpatory value for defendants. This order was based on the court's *in camera* examination of the videotapes ordered to be disclosed by the court of appeals. *United States v. Cuthbertson (Cuthbertson II)*, 511 F. Supp. 375 (D.N.J. 1981). The United States Court of Appeals for the Third Circuit reversed, noting that defendants had made no showing of the unavailability from alternative sources of the information sought. *United States v. Cuthbertson (Cuthbertson III)*, 651 F.2d 189 (3d Cir. 1981).

Criden, *Cuthbertson II* and *Cuthbertson III* represent further refinements of the application

In fashioning the *Riley-Cuthbertson I* privilege, the Third Circuit Court of Appeals departed from the common-law precedent denying a journalist's privilege.⁵⁹ Professor Wigmore argued that the scope of privileges from testifying should be narrowed, not broadened,⁶⁰ and this argument was adopted in the 1958 case of *Garland v. Torre*,⁶¹ in which the Second Circuit Court of Appeals declined to create a federal rule of privilege for confidential sources. In *Garland*, a libel action brought by an entertainer against a columnist for remarks attributed to unidentified television network officials, Judge (later Justice) Stewart held that the columnist must reveal her source. The opinion pointed out that there was no precedent for recognizing a reporter's privilege and no statutory law concerning the question, and found that public policy favored limiting, rather than extending, the scope of evidentiary privileges.⁶² The opinion noted that first amendment considerations were involved in the case but that plaintiff's right of access to the courts outweighed them.⁶³ The court pointed out that there were no other sources available to plaintiff, that plaintiff had made an effort to obtain the information from other sources and that the information plaintiff sought was obviously material to her claim.⁶⁴

The Supreme Court, while noting that "some form of constitutional newsman's privilege" had been recognized in some courts, rejected out of hand in *Branzburg v. Hayes* any common law privilege for confidential sources.⁶⁵ Though the Court ruled that no privilege to withhold sources applied, *Branzburg* has served as the basis for developing a first amendment privilege in other cases.⁶⁶ This is a result of the narrow holding of the majority opinion and the concurring opinion of Justice Powell.

Branzburg was actually a consolidated appeal of three cases.⁶⁷ Each case involved journalists who refused to testify before grand juries. The Court found that the public interest in law enforcement and the important role played by the grand jury in the law enforcement process were sufficient to counterbalance the "consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."⁶⁸

Justice Douglas dissented on the grounds that the first amendment gives a

of the privilege defined in *Riley* and *Cuthbertson I* but will not be treated in this Comment, which deals primarily with the source and nature of the privilege. When appropriate, these cases will be cited by way of amplification or illustration.

59. See sources cited in note 2 *supra*.

60. 8 J. Wigmore, *supra* note 2, § 2192.

61. 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958).

62. *Id.* at 550.

63. *Id.* at 549.

64. *Id.* at 551.

65. 408 U.S. at 686, 690.

66. See cases cited in note 76 *infra*.

67. *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970); *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1971); *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971).

68. 408 U.S. at 690-91 (White, J., joined by Burger, C.J., and Blackmun, Powell and Rehnquist, JJ.).

reporter immunity from testifying.⁶⁹ Justice Stewart, joined by Justices Brennan and Marshall, also dissented, asserting that the first amendment right to disseminate news implies some right to gather news and therefore to a confidential relationship with news sources.⁷⁰

Because four members of the Court recognized some reporter's privilege, the concurrence of Justice Powell, who also joined the majority opinion, is important. Justice Powell emphasized the limited scope of the majority opinion, pointing out that in requiring disclosure on the facts in *Branzburg*, the Court left open the possibility that a journalist's sources might be protected in other circumstances. The majority opinion indicated that a journalist could not be harassed by bad faith investigations,⁷¹ and Justice Powell construed this to mean that a journalist is entitled to move for the entry of a protective order either if the information sought "bear[s] only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential-source relationships without a legitimate need of law enforcement."⁷² A court then could determine, on the facts of an individual case, whether to grant the motion by balancing the interests of the press involved against the interests of the courts in obtaining the testimony.⁷³ Justice Powell contrasted his "ad hoc" balancing approach with the showing of governmental necessity urged by Justice Stewart's dissent, stating that his (Justice Powell's) approach would leave a court "free to balance the competing interests on their merits in the particular case," whereas the "heavy burdens of proof" which would be placed on the State under Stewart's rule "would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated."⁷⁴ If Justice Powell's opinion is interpreted as entitling a journalist to keep his sources secret in some cases, then five Justices in *Branzburg* recognized some form of protection for confidential sources.⁷⁵

Following *Branzburg*, lower federal courts read Justice Powell's concur-

69. Id. at 712 (Douglas, J., dissenting).

70. Id. at 728 (Stewart, J., dissenting).

71. Id. at 707-08.

72. Id. at 710 (Powell, J., concurring).

73. Id.

74. Id. at n.*. Justice Powell continued to apply his *Branzburg* approach in his concurring opinions in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), and *Herbert v. Lando*, 441 U.S. 153 (1979). In *Zurcher* the Court held valid a warrant to search the office of a university newspaper. 436 U.S. at 559-60. Justice Powell's opinion indicated that facts which would support the issuance of a warrant for a private residence might not be sufficient to support a warrant for a news office. "While there is no justification for the establishment of a separate Fourth Amendment procedure for the press, a magistrate asked to issue a [search] warrant for [a news office] can and should take cognizance of the independent values protected by the First Amendment . . ." Id. at 570 (Powell, J., concurring). In *Lando* the Court required disclosure by a newspaperman (defendant in a civil libel action) of thought processes and editorial procedures involved in the decision to print his story. 441 U.S. at 169. Justice Powell joined the majority with the "understanding that in heeding [the] admonitions [of the majority] to focus on relevance and not to neglect the power to restrict discovery when necessary, the district court must ensure that the values protected by the First Amendment, though entitled to no constitutional privilege in a case of this kind, are weighed carefully . . ." Id. at 180 (Powell, J., concurring).

75. Justices Powell, Douglas, Stewart, Brennan and Marshall.

rence in conjunction with the four dissenting votes as creating a limited privilege for confidential sources, particularly in non-grand jury contexts.⁷⁶ One of the first cases to consider the meaning of *Branzburg* was the rehearing of *Bursey v. United States*.⁷⁷ Considering the question of compelled testimony before a grand jury, the United States Court of Appeals for the Ninth Circuit had stated, prior to the *Branzburg* decision, that for the government to compel testimony, it must show that it has an "overriding" interest in the proceedings which is closely related to the information sought and that forced disclosure is necessary to meet that interest.⁷⁸ On petition for rehearing after the *Branzburg* decision, the court simply found that "the balance we struck [in *Bursey*] is not impaired by *Branzburg*."⁷⁹

In *Baker v. F & F Investment* the United States Court of Appeals for the Second Circuit also read *Branzburg* as creating a limited first amendment privilege.⁸⁰ In *Baker*, a civil rights action, plaintiffs sought to compel a reporter to reveal the source of information used in writing an article concerning the illegal "blockbusting" tactics used by defendant real estate brokers. The article revealed that the information came from an anonymous real estate agent. The district court judge refused to order production of the information, and the case was appealed on a question of abuse of discretion.⁸¹ The Second Circuit Court of Appeals held that, because forced disclosure of confidential sources undermines the ability of the press to acquire information, such disclosure constitutes a threat to a free press and to the public's need to be informed.⁸² On the facts of the case, the court found that the first amendment need not yield.⁸³ In balancing the interests of the press against those of the judicial system, the court cited the following three significant factors: that the

76. E.g., *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977) (discussed at notes 87-91 and accompanying text infra); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976) (privilege forced to yield to defendant's right to fair trial); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), cert. dismissed, 417 U.S. 938 (1974) (discussed at note 91 infra); *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973) (discussed at notes 80-86 and accompanying text infra); *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972) (discussed at notes 77-79 and accompanying text infra); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972) (discussed at note 91 infra); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973) (privilege protected newspapers from subpoena in civil action brought by DNC as a result of the Watergate break-in). But see *United States v. Liddy*, 354 F. Supp. 208 (D.D.C. 1972) (privilege not recognized).

Some states also have found a first amendment privilege after the *Branzburg* decision. E.g., *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974); *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429, cert. denied, 419 U.S. 966 (1974). But see, e.g., *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d 791, cert. denied, 434 U.S. 930 (1977); *Dow Jones & Co. v. Superior Court*, 364 Mass. 317, 303 N.E.2d 847 (1973).

77. 466 F.2d 1059 (9th Cir. 1972).

78. Id. at 1083.

79. Id. at 1091.

80. 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973).

81. Id. at 780-81.

82. Id. at 782. The court also found that the shield statutes in the states in which the parties were located, Illinois and New York, reflected the "paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters." Id.

83. Id. at 782-83.

reporter was not a party to the proceedings, that plaintiffs could obtain the information they sought from other sources and that the information sought did not go to the heart of their case.⁸⁴ Noting the broad scope of discretion under rule 37 of the Federal Rules of Civil Procedure, the court found no abuse of discretion.⁸⁵

Branzburg was distinguished as being limited to criminal proceedings before a grand jury, where the balance between the first amendment privilege and the compelling state interest in effective law enforcement favored the state. Reading Justice Powell's concurrence as indicating limits to what information could be required even in the criminal context, the court pointed out that these limits were even more applicable to a civil action, where the balance was between the public's right to know and a private citizen's need to compel information. The private citizen's need was not considered sufficient to force the first amendment privilege to yield.⁸⁶

In *Silkwood v. Kerr-McGee Corporation*⁸⁷ the United States Court of Appeals for the Tenth Circuit was faced with the question of quashing a subpoena duces tecum issued to a filmmaker by defendant corporation.⁸⁸ Defendant was charged in a civil action with conspiracy to prevent labor union organization and to prevent the filing of Atomic Energy Act complaints by decedent, and with willful and wanton contamination of decedent with toxic radiation, resulting in her death. The subpoena was directed at materials and sources used by the filmmaker in the preparation of a film on decedent's death.⁸⁹ While noting that the *Branzburg* Court found no absolute privilege for confidential sources,⁹⁰ the court nevertheless stated that the preferred position of the first amendment required that there be no more infringement of the press than is necessary. *Branzburg* was read to hold that although a reporter must appear and testify when called, he is not required to answer.⁹¹

84. Id. at 783.

85. Id.

86. Id. at 784-85.

87. 563 F.2d 433 (10th Cir. 1977).

88. Although the filmmaker was not a salaried news reporter (he was a student in the UCLA film department), he was found to be acting in a capacity to bring him within the protection of the press privilege. "[T]he press comprehends different kinds of publications which communicate to the public information and opinion." Id. at 437 (citing *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1935)).

89. 563 F.2d at 434-35.

90. The *Branzburg* decision was noted to be limited to criminal cases. Id. at 436.

91. Id. The *Silkwood* court also relied on two cases in which media libel defendants had attempted to invoke a confidential-source privilege, *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), and *Carey v. Hume*, 492 F.2d 641 (D.C. Cir.), cert. dismissed, 417 U.S. 938 (1974). The United States Court of Appeals for the Eighth Circuit noted in *Cervantes* that the first amendment does not create a privilege for confidential sources but found that requiring disclosure without first inquiring into the substance of the complaint "would utterly emasculate" the principles which required constitutional protection for libel defendants. 464 F.2d at 992-93. Reasoning that the mass of defendant's "thoroughly documented" research already available to plaintiff, together with plaintiff's claim that only four of eighty-seven published paragraphs contained falsehoods, tended to rebut the claim that defendant had published with reckless disregard for the truth, and noting that there was nothing to require compelled disclosure, the court declined to require disclosure. Id. at 994-95.

In *Carey* the United States Court of Appeals for the District of Columbia adopted the view

The approach of these cases can be contrasted with the approach of *Mullen v. United States*,⁹² in which a federal common-law privilege for penitent-minister communications was created. *Mullen* was decided in 1958, before the Federal Rules of Evidence were enacted. But even in the absence of any statutory protection, the United States Court of Appeals for the District of Columbia found that a confession made by defendant to her minister could not later be used to convict her.⁹³ Although the court could find no precedent for recognition of the privilege, it stated: "When reason and experience call for recognition of a privilege which has the effect of restricting evidence the dead hand of the common law will not restrain such recognition."⁹⁴ Further, the privilege fit the following characteristics, which Professor Wigmore had identified as essential for an evidentiary privilege:⁹⁵ the communication originated in confidence of non-disclosure; confidentiality was essential to the maintenance of the penitent-confessor relationship; the relationship was one that, in the standards of the community, ought to be fostered; and the injury to the relationship that would be caused by disclosure of the confidence was greater than the benefit which would be gained by disclosure.⁹⁶

The *Riley* and *Cuthbertson I* opinions did not adopt this evidentiary privilege approach.⁹⁷ The *Riley* court chose to read Federal Rule of Evidence 501, based on its legislative history, as allowing the federal courts, in federal question cases, to develop a privilege for reporters.⁹⁸ Such a reading is fully consonant with the literal text of the rule⁹⁹ and is probably a fair reading of the congressional intent of the rule as presented by Representative Hungate's comment that "Rule 501 permits the courts to develop a privilege for newspaper people on a case-by-case basis . . . [and] cannot be interpreted as a congressional expression in favor of having no such privilege."¹⁰⁰

It should be noted, however, that Congress separately considered the pos-

that disclosure of confidential sources should be compelled only as a last resort, 492 F.2d at 639, but found that (1) when the information sought was vital to plaintiffs' case, the claim was not frivolous, (2) the reporting (unlike that in *Cervantes*) was not "meticulously detailed," and (3) it was essentially impossible for plaintiffs to obtain the information in any other way, disclosure should be compelled. *Id.* at 636-39. An additional concern underlying the *Carey* result may be found in a concurring opinion, as follows: "If newsmen can refuse to name the source of defamatory stories, they can effectively vitiate what is left of the libel laws by hiding behind anonymous sources whenever sued." *Id.* at 640 (MacKinnon, J., concurring).

The *Silkwood* court also found it significant that in *Cervantes* the request for information had been vague and inconsequential, whereas the request in *Carey* had been directed at specific information important to plaintiffs' case. 563 F.2d at 438.

92. 263 F.2d 275 (D.C. Cir. 1958).

93. *Id.* at 277.

94. *Id.* at 279.

95. 8 J. Wigmore, *supra* note 2, § 2285.

96. 263 F.2d at 280.

97. An outline to this approach may be found in M. Van Gerpen, *supra* note 2, at 60-62.

98. 612 F.2d at 713-14.

99. "Except as otherwise required by the Constitution [or congressional statutes or Supreme Court rules], the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501.

100. 120 Cong. Rec. 40,890-91 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 7108, 7110.

sibility of creating a specific reporter's privilege and declined to do so.¹⁰¹ In the absence of other information, this could be interpreted as congressional disapproval of the journalist's privilege; but in light of the express congressional intent to leave all questions of privilege open for development by the courts,¹⁰² and the complexity of the problems involved,¹⁰³ the conclusion that Congress preferred to shift the resolution of the issue to the court system is almost irresistible.

The *Riley* court's conclusion that *Branzburg* acknowledged first amendment protection of the news-gathering function of the press¹⁰⁴ is more questionable¹⁰⁵ and rests primarily on *Branzburg*'s recognition of the public policy supporting an unfettered press's role in society.¹⁰⁶ The court correctly pointed out that the first amendment seeks to protect the unique function of the press in keeping the public informed¹⁰⁷ and rather neatly concluded that the facts of the *Branzburg* case (grand jury-criminal action) were not applicable to the *Riley* case (trial court-civil action).¹⁰⁸ Though such a limited reading of *Branzburg* has been adopted by other circuits,¹⁰⁹ it is not entirely in keeping with significant portions of the *Branzburg* majority opinion, and therefore subject to question as a basis for decision.

While *Branzburg* stated that "[t]he sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do,"¹¹⁰ this statement must be read in connection with the preceding paragraph, which emphasized that *Branzburg* did not involve areas in which the first amendment clearly would be implicated.¹¹¹ The formulation of the issue in this context does not serve to narrow the scope of the holding, but to distinguish areas

101. *Branzburg v. Hayes*, 408 U.S. 665, 689 n.28 (1972). See M. Van Gerpen, *supra* note 2, at 146-47.

102. Rule 501 had previously contained a specific list of privileges, in which the reporter's privilege was not contained, but this list was dropped in order to provide for judicial development. S. Rep. No. 1277, 93d Cong., 2d Sess. 6-7 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 7051, 7052-53; H.R. Rep. No. 650, 93d Cong., 1st Sess. 8-9 (1973), reprinted in 1974 U.S. Code Cong. & Ad. News 7075, 7082-83.

103. Cf. Chamberlin, *Protection of Confidential News Sources—An Unresolved Issue*, 44 *Popular Gov't* 18, 20 (Fall 1978) (in which then-Senator Sam Ervin described the problem of confidential sources as "the most difficult field I have ever tried to write a bill in since I have been in Congress").

104. 612 F.2d at 714.

105. Cf. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 582 (1980) (Stevens, J., concurring) (eight years after *Branzburg*, read as first case affording constitutional protection to the acquisition of newsworthy material).

106. 612 F.2d at 715.

107. The court cites language to this effect from *New York Times Co. v. United States*, 403 U.S. 713 (1971) (*per curiam*), and *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

108. 612 F.2d at 714.

109. See, e.g., *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436 (10th Cir. 1977); *Baker v. F & F Inv.*, 470 F.2d 778, 784 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973).

110. 408 U.S. at 682.

111. But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt

in which the first amendment would be implicated directly from the universal duty to testify, imposed on citizens generally.¹¹² That duty, which must be imposed if the judicial system is to operate, does not vary as a function of the type of proceeding; to argue so is as illogical as arguing that the interests of the press in maintaining the confidentiality of its sources change as a result of the nature of the proceedings in which a reporter is called upon to testify.¹¹³ To say that the press has a lesser interest in protecting confidentiality in a grand jury proceeding because of the secrecy surrounding that proceeding is to overlook the obvious—(1) that once a reporter has compromised a source's identity, the reporter can no longer successfully represent to current or potential sources that he will protect their confidentiality; (2) that participants in a grand jury proceeding are not prohibited from discussing that proceeding later; and (3) that the party seeking the identity of a source very well may be the party from whom the source most desires that his identity be withheld. By the same token, though the public interest in procuring testimony for a murder trial arguably may be greater than that in procuring testimony for a civil case, the critical inquiry is into the integrity of the judicial system itself, on which every citizen should be entitled to rely. That *Branzburg* found "the longstanding principle that 'the public . . . has a right to every man's evidence' . . . particularly applicable to grand jury proceedings"¹¹⁴ does nothing to diminish its applicability to other judicial proceedings. The Court in its opinion spent little time distinguishing between the need for evidence in different proceedings. Rather, the opinion stated that the "public interest in law enforcement" required reporters to answer questions in the course of a grand jury proceeding or a "criminal trial."¹¹⁵ It does violence to this language to argue that *Branzburg* applies only to grand jury proceedings.

Branzburg did not address directly the question of confidential sources in a civil proceeding, but there are indications in the opinion that the Court would not change its view in a civil setting. First, and most important, the Court stressed the right of the judicial system to "every man's evidence."¹¹⁶ This is a matter that goes not merely to the public interest in the specific proceedings at hand but to the public interest in maintaining an effective judicial

is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

Id. at 681-82.

112. This is a recurring point in the majority opinion. See 408 U.S. at 682, 686, 688, 690, 697.

113. See *Cuthbertson I*, 630 F.2d 139, 147 (1980).

114. 408 U.S. at 688.

115. Id. at 690-91.

116. Id. at 688. That this right to evidence was recognized by the Court to be a vital part of our Anglo-American jurisprudential system and to apply with equal force to civil as well as criminal actions is shown by the Court's quotation of Jeremy Bentham:

Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly.

Id. at 689 n.26 (quoting 4 The Works of Jeremy Bentham 320-21 (J. Bowring ed. 1843)).

system that will meet the needs of every citizen. Second, the Court displayed great reluctance to extend to journalists a privilege not enjoyed by other citizens.¹¹⁷ Given this attitude, it is difficult to imagine that the Court would easily extend such a privilege, even in a civil action. Finally, the Court also was concerned with the difficulty of administration of the privilege in general, stating that such administration "would present practical and conceptual difficulties of a high order."¹¹⁸ Once again, it is impossible to argue that this objection would cease to exist in a civil action.

Thus, such a narrow reading of *Branzburg* is unjustified by the language of the opinion.¹¹⁹ Probably realizing this, the *Riley* court relied *not* on a privilege guaranteed by the Constitution, but on one which is required by "public policy" of a "constitutional dimension."¹²⁰

The *Riley* court bolstered its argument that public policy requires the recognition of a privilege by reference to other federal cases recognizing such a privilege, all of which limited *Branzburg*.¹²¹ It also recognized Pennsylvania law concerning reporters' privilege,¹²² citing both statutory¹²³ and case law¹²⁴ protecting reporters from forced revelation of their confidential sources. Pennsylvania's privilege, unlike the one asserted in *Branzburg*, is *not* derived from the first amendment,¹²⁵ but on the public policy (enacted into law by the legislature of the commonwealth) "*which has placed the gathering and the protection of the source of news as of greater importance to the public interest and of more value to the public welfare than the disclosure of the alleged criminal.*"¹²⁶

117. *Id.* at 682, 686, 688, 690, 697.

118. *Id.* at 703-04.

119. See *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 292-94, 562 P.2d 791, 795-97, cert. denied, 434 U.S. 930 (1977).

120. 612 F.2d at 715. In subsequent opinions, the United States Court of Appeals for the Third Circuit has continued to have difficulty with the status of the privilege. In *Criden* the privilege is identified as one "deeply rooted in the first amendment." *United States v. Criden*, 633 F.2d at 356. The *Criden* court went on to say that "[w]hen no countervailing constitutional concerns are at stake, it can be said that the privilege is absolute," *id.*, a statement that is highly questionable in light of *Branzburg*. Even in *Criden*, the court's analysis of the privilege relied heavily on the judicial "value judgment" implicit in the recognition of the privilege. *Id.* at 355-56. In *Cuthbertson III*, the privilege is identified as involving a "fair trial-free press" controversy, 651 F.2d at 195, implying a constitutional dimension to the privilege. Yet the court identified the privilege as one granted by the federal common law. *Id.*

121. *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977) (discussed at notes 87-91 and accompanying text *supra*); *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972) (discussed at notes 80-86 and accompanying text *supra*); *Zerilli v. Bell*, 458 F. Supp. 26, 28 (D.D.C. 1978) (limiting *Branzburg* to grand jury setting and relying on Justice Powell's concurrence); *Gulliver's Periodical, Ltd. v. Charles Levy Circulating Co.*, 455 F. Supp. 1197, 1201-02 (N.D. Ill. 1978) (same as *Zerilli*); *Altomose Constr. Co. v. Building & Constr. Trades Council*, 443 F. Supp. 489, 491 (E.D. Pa. 1977) (relying on Justice Powell's concurrence); *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505, 508-09 (E.D. Va. 1976) (same as *Zerilli*).

122. "A federal court sitting in a non-diversity case . . . may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect." *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 471 (1942) (Jackson, J., concurring).

123. 42 Pa. Cons. Stat. Ann. § 5942 (Purdon 1981).

124. *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963).

125. *Id.* at 40, 193 A.2d at 185.

126. *Id.* at 42, 193 A.2d at 185-86 (emphasis in original).

Such a codification of policy, clearly a proper matter for state action,¹²⁷ is directly at odds with the policy expressed in *Branzburg* that the "public interest in law enforcement" outweighs the resultant "burden on news gathering."¹²⁸ Nevertheless, by adopting a policy and precedent rationale for recognizing some privilege protecting sources, the *Riley* court escaped direct conflict with *Branzburg*. Even if *Branzburg* denies constitutional protection to confidential sources, "public policy" may still require that the effect on the press be considered by a court dealing with confidential-source questions. Because this public policy in favor of a free and uninhibited press is expressed in the first amendment,¹²⁹ it is a policy of "constitutional dimension."¹³⁰

The *Riley* court justified its reliance on *Branzburg* by looking to Justice Powell's concurrence.¹³¹ Implicit in that reliance is the assumption that Justice Powell voted in favor of fashioning a privilege and that therefore a majority of the Court recognized the existence of a privilege of some kind. Because Justice Powell's concurrence represents the narrowest application of the privilege, it defines any privilege recognized.¹³²

A conservative reading of Justice Powell's concurrence indicates that, in any case that puts the public's right to testimony in conflict with considerations of freedom of the press, the court will always have the power to protect the interests of the press (or the public) after balancing the competing interests on a case-by-case basis.¹³³ The press would be protected when it is asked to provide information "bearing only a remote and tenuous relationship" to the proceedings, or when sources will be compromised without meeting a "legitimate need" of enforcing the law.¹³⁴ This language is perhaps more deferential to the press than that found in the majority opinion but would appear to amplify the majority's reminder that "[g]rand juries are subject to judicial control and subpoenas to motions to quash."¹³⁵ If this protection amounts to a privilege, it is a far cry from that recognized in *Mullen*.¹³⁶ Here there is no discussion of Professor Wigmore's criteria for an evidentiary privilege—only a reference to the competing interests of the public in freedom of the press and in the obtaining of every man's testimony. There is no mention in the majority opinion of any privilege at all—only of the court's power to control the proceedings. What appears to be emerging is not a privilege in the sense to which the law of evidence is accustomed, but a guideline by which judges are to be guided in making decisions on admissibility. Such an approach can be based entirely on

127. 408 U.S. at 706.

128. *Id.* at 690. See discussion at notes 67-75 and accompanying text *supra*.

129. It is recognized in *Branzburg* also. See text accompanying notes 21-23 *supra*.

130. 612 F.2d at 715.

131. *Id.* at 716.

132. See discussion of *Branzburg* opinions at notes 67-75 and accompanying text *supra*. One difficulty with a vote-counting analysis is that it requires taking note of changes in the make-up of the Court.

133. 408 U.S. at 710 (Powell, J., concurring).

134. *Id.*

135. *Id.* at 708.

136. See discussion at notes 92-96 and accompanying text *supra*.

public policy grounds and need not be based on first amendment considerations. This line of reasoning may be seen in two decisions of an English court involving reporters attempting to protect their work materials from process. England, it must be noted, has no first amendment or any analogous constitutional provision; indeed, the English judicial system recognizes no testimonial privileges other than those contained within the attorney-client relationship.¹³⁷

In *Attorney General v. Mulholland*,¹³⁸ a 1963 decision, Lord Denning, Master of the Rolls, stated that a court would not require a newsman to answer a question put to him in a judicial proceeding "unless not only it is relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered."¹³⁹ Although Lord Justice Donovan took issue with the "necessary" requirement, advocating that the court require only that the information sought serve a "useful purpose," he pointed out that the court was not *required* to cite for contempt even when information withheld was properly admissible.¹⁴⁰ Lord Denning, in the 1976 case of *Senior v. Holdsworth*,¹⁴¹ reiterated his *Mulholland* stance, stating that the court would balance the need for evidence with the possible adverse effect on the newsman's reporting to the public.¹⁴² This emerging English approach bears a strong resemblance to the type of balancing advocated by Justice Powell in *Branzburg*.¹⁴³

Stating that a court has the power to exclude evidence for policy reasons is only a first step. The critical inquiry is when that power should be exercised. The majority in *Branzburg* would extend protection in cases of bad faith investigation or harassment,¹⁴⁴ and Justice Powell would extend protection when the information sought bears "only a remote and tenuous relationship" to the proceedings or fails to meet a "legitimate need" of law enforcement.¹⁴⁵

The *Riley* court apparently embraced a "necessary" standard (arguably one approach to a reading of Powell's concurrence),¹⁴⁶ requiring a showing of

137. 17 Halsbury's Laws of England ¶ 237, at 166 (4th ed. 1976).

138. [1963] 2 Q.B. 477.

139. *Id.* at 489 (opinion of Denning, M.R.).

140. *Id.* at 492 (opinion of Donovan, L.J.). "[T]here may be other considerations [than relevancy or usefulness], impossible to define in advance, but arising out of the infinite variety of fact and circumstance which a court encounters, which may lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer." *Id.*

141. 1976 Q.B. 23.

142. *Id.* at 34 (opinion of Denning, M.R.). Lord Denning cited *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973), a case arising from the press coverage of the Watergate break-ins, as evidence of the need for allowing reporters in some cases to keep their confidences. 1976 Q.B. at 34 (opinion of Denning, P.R.).

143. Justice Powell adopted a similar approach in *Zurcher* and *Lando*. See discussion at note 74 *supra*.

144. 408 U.S. at 707-08. Compare that view with Fed. R. Evid. 611(a): "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

145. 408 U.S. at 710 (Powell, J., concurring).

146. See discussion at notes 167-69 and accompanying text *infra*.

a "demonstrated, specific need for evidence" in order to compel testimony.¹⁴⁷ This requirement, as applied by the *Riley* court, goes beyond even a liberal reading of *Branzburg* in one important respect: it assumes that a reporter is privileged to withhold information unless a need for it is shown.¹⁴⁸ Both the *Branzburg* majority and Justice Powell's concurrence presume a duty to testify unless a protective order is requested and obtained.¹⁴⁹ This shift in approach was justified by the *Riley* court on two grounds.

First, the court argued that the Supreme Court in *United States v. Nixon*¹⁵⁰ required that "[w]hen a privilege is grounded in constitutional policy, a 'demonstrated, specific need for evidence' " must be shown before it can be overcome.¹⁵¹ A major stumbling-block in the application of *Nixon* to confidential sources is that in *Nixon* the Court found that the separation of powers clause in the Constitution created an executive testimonial privilege.¹⁵² In *Branzburg*, of course, no testimonial privilege was found in the first amendment.¹⁵³

The court's second rationale for the affirmative duty upon the party seeking disclosure involved the circumstances of the case, which bear on the applicability of the privilege.¹⁵⁴ *Riley* involved a journalist who was only a third-party witness in a civil action; this was not a criminal case, or a case in which a reporter had a personal interest in the outcome.¹⁵⁵ Although some lower court precedent exists for this proposition, the Supreme Court's concern for the necessity of "every man's evidence" undermines this view.¹⁵⁶

While the *Riley* court overreached *Branzburg* in its approach to the burden of proving the privilege, it may have been on safer ground with its approach to the balancing required in order to determine whether judicial protection will be accorded confidential-source information. The first of the two prongs of the *Riley* test is that the information be available from no other source.¹⁵⁷ This test is essentially that set forth in *Garland*, albeit in negative

147. 612 F.2d at 716 (quoting *United States v. Nixon*, 418 U.S. 683, 713 (1974)).

148. "[P]laintiff must demonstrate why his interest . . . is dependent upon the information sought." *Id.*

149. 408 U.S. at 707-08, 709-10 (Powell, J., concurring).

150. 418 U.S. 683 (1974).

151. 612 F.2d at 716 (quoting 418 U.S. at 713).

152. 418 U.S. at 705-06.

153. 408 U.S. at 690-91.

154. 612 F.2d at 716.

155. *Id.*

156. See note 116 and accompanying text *supra*.

157. 612 F.2d at 716. The United States Court of Appeals for the Third Circuit has identified the test as a "three-pronged" one, as follows:

First, the movant must demonstrate that he has made an effort to obtain the information from other sources. Second, he must demonstrate that the only access to the information sought is through the journalist and her sources. Finally, the movant must persuade the Court that the information sought is crucial to the claim.

Cuthbertson III, 651 F.2d at 195-96 (quoting *United States v. Criden*, 633 F.2d at 358-59).

This Comment treats the first of the above "prongs" as an element of the second. See text accompanying notes 162-65 *infra*. Therefore, the *Riley* test is viewed for purposes of this Comment as "two-pronged."

form.¹⁵⁸ There is no direct support for this standard in *Branzburg*. An attempt to force disclosure of confidential information when the information is available from non-press sources might, however, amount to "harassment . . . undertaken not for purposes of law enforcement," which the *Branzburg* majority would find unjustifiable.¹⁵⁹ If Justice Powell's concurrence sets the standard for protection of confidential information, then the alternative-source test becomes more supportable. Surely, if the information sought can be obtained from another source, compelled disclosure is *not* a "legitimate need of law enforcement," and a protective order can be entered.¹⁶⁰ Such an approach would also carry out the policy expressed by lower courts that the judiciary should avoid implication of first amendment questions when possible, and especially in cases where the public interest in obtaining testimony can be satisfied without burdening a free press.¹⁶¹ When the information sought is available elsewhere, no balancing is required—no information is lost.

The determination of the availability of alternative sources was made by the *Riley* court on the basis of the following criteria suggested by *Garland*: that an exhaustive and unsuccessful attempt be made to obtain the information from other sources and that the only "practical access to crucial information . . . is through the newsman's sources."¹⁶² Previous cases based such a determination on the facts of each case, and a court attempting to develop such facts might be advised to require a showing by any or all of the parties involved as to the nature of the information sought or the information available.¹⁶³ Requiring a showing by any of the parties, rather than of only the

158. See notes 61-64 and accompanying text *supra*.

159. 408 U.S. at 707-08.

160. *Id.* at 710 (Powell, J., concurring).

161. See, e.g., *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976). The *Steelhammer* case is especially interesting because the United States Court of Appeals for the Fourth Circuit struck down a contempt citation even though the journalists involved had made no confidential source claim. The two reporters had attended a union meeting concerning a wildcat strike to be held in defiance of a restraining order. Summoned as witnesses at the contempt trial of the strikers, the reporters refused to testify, arguing that their access to future union meetings might be harmed if they testified. Found in contempt, they were sentenced to six months imprisonment. In the course of the proceedings, other journalists provided the court with the information sought. *Id.* at 375.

Carefully limiting its decision to the facts of the case and considering the balance of the public interests in requiring truth in judicial proceedings and in maintaining a free press, the court found that it was possible to accomplish the first without harming the second. Because the court could obtain the information sought without directly involving the reporters, there was no need to create a conflict between the courts and the press, and therefore, the court did not compel the reporters' testimony. *Id.* at 374-75.

162. 612 F.2d at 717 (quoting *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505, 510 (E.D. Va. 1976)); see *Garland v. Torre*, 259 F.2d 545, 550-51 (2d Cir.), cert. denied, 358 U.S. 910 (1958).

163. See, e.g., *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977). See note 91 *supra*. A standard of subjective reasonableness also has been applied by the courts. In *Garland* the three possible sources had been contacted and were of no help, 259 F.2d at 547; in *Baker* it was thought reasonable for plaintiffs to attempt to obtain the information sought from some sixty defendants, 470 F.2d at 780; but the court in *Carey v. Hume*, 492 F.2d 631, 638-39 (D.C. Cir.), cert. dismissed, 417 U.S. 938 (1974), found that plaintiff could not be expected to interview all the employees of the national offices of the United Mine Workers of America to develop an alternative source of information.

party seeking the information, as indicated by *Riley*,¹⁶⁴ comports more closely with Justice Powell's argument that the balancing process should not be based on one side's meeting set preconditions, but on the court's own balancing of the merits based on the facts.¹⁶⁵

If the court finds that the information is available from another source, then the inquiry should end. If not, the court must consider the second prong of the test: whether the "materiality, relevance and necessity" of the information is sufficient to justify the burden placed on a free press by compelling testimony.¹⁶⁶ Echoing *Garland*, the *Riley* court said that "[t]he material sought must 'provide a source of crucial information going to the heart of the [claim].'"¹⁶⁷ Relevance and materiality¹⁶⁸ should be considered in the offering of any testimony. It is less defensible to require as a prerequisite to forcing disclosure that the information sought be crucial to the claim. The *Branzburg* majority opinion found that when the information sought was of so little relevance that forced disclosure would constitute "harassment," a court should grant protection. Justice Powell's statement that protection should be granted if the "legitimate needs" of law enforcement are not met by disclosure might be interpreted as requiring that the information sought should be "necessary" for the development of the requesting party's case; on the other hand, it could more easily be read in conjunction with the words "remote and tenuous"¹⁶⁹ as providing protection only where the information sought is not useful. Either reading would grant protection in cases falling short of harassment, but neither rises to the level of requiring that the information be crucial.

In applying the two-pronged test of alternative availability and sufficient relevance to the *Riley* facts, the court noted that the record indicated that no attempt was made by plaintiff to obtain the information from the most obvious alternative source, and that the information sought was of "marginal relevance" to the action.¹⁷⁰ Therefore, the court correctly extended protection to the reporter.¹⁷¹ In discussing the need for the information sought in the *Riley*

164. 612 F.2d at 716-17.

165. 408 U.S. at 710 n.* (Powell, J., concurring).

166. 612 F.2d at 716.

167. Id. at 717 (quoting *Gulliver's Periodical, Ltd. v. Charles Levy Circulating Co.*, 455 F. Supp. 1197, 1204 (N.D. Ill. 1978)). See *Garland v. Torre*, 259 F.2d at 550. It cannot be inferred unequivocally from *Garland*, however, that only material going to the "heart" of a claim is sufficiently relevant to justify compelled disclosure. In discussing the relevancy of the material sought, the *Garland* court noted simply that not only was the information of more than "doubtful relevance or materiality," it in fact went to the "heart of the claim." Id. at 549-50. The opinion never treated the question whether any lesser degree of relevancy would require disclosure. The *Riley* court was correct, however, in observing that other courts have incorporated the "heart of the claim" approach into the balancing test. See notes 76-84 and accompanying text *supra*.

168. "Materiality" as a requirement for admissibility appears to have been dropped from the Federal Rules of Evidence in favor of a revised definition of "relevance." Fed. R. Evid. 401, Advisory Comm. Note. For this Comment, the term "relevance" will be used in place of "relevance and materiality."

169. 408 U.S. at 710 (Powell, J., concurring).

170. 612 F.2d at 717-18.

171. The *Riley* court spoke in terms of whether the "reporter's privilege" should yield rather than in terms of whether the court should grant the reporter's request for protection. Id. at 715. Although the result tends to be the same, an approach more consonant with the *Branzburg* analysis developed in this Comment is to say that the reporter's request for protection should be granted by the court. Though technically the reporter in *Riley* did not request a protective order (she

proceedings, the court may have created a third prong to its test, related to the others, yet distinct. The *Riley* opinion stressed that an analysis of the need for the information sought should be made "in the context of the other testimony" available to the trial court.¹⁷² Because the court had access to sufficient evidence from other sources that "[did] not differ in kind or degree" from the information sought, the court found that there was insufficient need for the additional testimony to justify the contempt sentence.¹⁷³

This reasoning suggests that even if the information sought fails to qualify for protection under the two-pronged test, it may still escape disclosure. That is, even though the specific information sought is not available from an alternative source, and even though it is, standing alone, sufficiently relevant to justify compelled disclosure, a court still may choose to allow a journalist to remain silent if that information, when viewed together with all other available evidence, is unlikely to have any significant additional effect on the result of the proceedings.¹⁷⁴ The justification for this result is that such information is not useful enough to the proceedings to require the court to force a confrontation with the press.

The decision of the same court in *Cuthbertson I*¹⁷⁵ relied on *Riley* to make the privilege applicable to criminal proceedings and to other materials acquired by the press in the news-gathering process without regard to their connection with confidential sources.¹⁷⁶ The court found that the same reasons exist for allowing the privilege in all kinds of proceedings and that the interests of the press are the same in criminal cases as they are in civil cases.¹⁷⁷ This would appear to be a bootstrapping approach to the development of the privilege because the *Riley* court partially based its finding that *Branzburg* did not apply to the *Riley* facts because *Riley* was a civil, rather than a criminal, action.¹⁷⁸ For the court in *Cuthbertson I* then to find no essential difference

simply refused to answer, invoking reporter's privilege), there is no reason why a trial judge should not treat such an invocation of privilege as a request for protection. Requesting protection from the court, however, would be a much wiser tactical move for a reporter seeking to invoke the "privilege." Such a request would display a respect for the judicial power and be far more likely to have a positive influence on the court than the strident assertion of an absolute right that does not exist. See Newhouse Dedication Address, 5 Media L. Rep. 1837 (1979) (address by Brennan, J.).

172. 612 F.2d at 718.

173. *Id.*

174. See, e.g., *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), discussed at note 91 *supra*. This idea may be related conceptually to the provision in the Federal Rules of Evidence allowing relevant evidence to be excluded "if its probative value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. The confidential source information may not be "cumulative" in the strictest sense, yet it may be of such a nature as to contribute so little to the progress of the trial that it need not be admitted.

175. 630 F.2d 139 (3d Cir. 1980). The *Cuthbertson I* opinion was written by Chief Judge Seitz and was joined by Judges Gibbons and Rosenn. *Id.* at 142. The *Riley* opinion was written by Judge Sloviter and was joined by Judges Gibbons and Higginbotham. 612 F.2d at 710.

176. 630 F.2d at 147.

177. *Id.*

178. 612 F.2d at 714, 716.

between the two types of proceedings defeats the basis of the *Riley* privilege in the first instance.

The conflict may be resolved, however, if the essential basis for the *Riley* result is not the classification of the case as civil, but the recognition that *Branzburg* authorized protection for a testifying journalist when the circumstances require.¹⁷⁹ To the extent that considerations present in a criminal case (e.g., protection of the public from violent crime, the sixth amendment rights of a defendant) may tend to outweigh the policies supporting protection of the press, the criminal-civil distinction may have an effect on the results of the balancing, but not on whether balancing should occur.¹⁸⁰

The Supreme Court in *Branzburg* was concerned with the judicial system's need for testimony for the purposes of investigating criminal activity.¹⁸¹ In *Cuthbertson I* the sixth amendment rights of a criminal defendant¹⁸² were placed in opposition to the qualified privilege of the journalist. Rather than accepting the argument that a defendant's constitutional rights must always override the privilege,¹⁸³ the *Cuthbertson I* court, relying on language in the Supreme Court's opinion in *Nebraska Press Association v. Stuart*,¹⁸⁴ determined that the competing interests of the first and sixth amendments be weighed by the balancing process on a case-by-case basis.¹⁸⁵

The court's reliance on *Nebraska Press Association* is not entirely justified. That case concerned a judicial order calling for prior restraint,¹⁸⁶ an order that is presumed constitutionally invalid.¹⁸⁷ In contrast, the *Branzburg* decision indicated that the operative presumption is in favor of the requirement to testify and that some showing is required to obtain exemption from that requirement.¹⁸⁸ Further, the *Riley-Cuthbertson I* privilege is a "federal common law privilege," grounded in constitutional policy,¹⁸⁹ not a privilege directly secured by the Constitution as is, for example, the privilege against

179. See text accompanying notes 70-75 *supra*.

180. Compare *United States v. Criden*, 633 F.2d at 359 (privilege required to yield to criminal defendants' interests) with *Cuthbertson III*, 651 F.2d at 196 (privilege not required to yield to criminal defendants' interests).

181. 408 U.S. at 690.

182. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor . . ." U.S. Const. amend. VI.

183. See, e.g., *In re Farber*, 78 N.J. 259, 394 A.2d 330, cert. denied sub nom. *New York Times Co. v. New Jersey*, 439 U.S. 997 (1978).

184. The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. . . . [I]f the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do.

427 U.S. 539, 561 (1976) (quoted in *Cuthbertson I*, 630 F.2d at 147).

185. 630 F.2d at 147.

186. 427 U.S. at 541.

187. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

188. See text accompanying note 149 *supra*.

189. 612 F.2d at 715-16.

self-incrimination.¹⁹⁰ Thus, the court was not confronted with a conflict of constitutional guarantees, but with a conflict between a defendant's constitutional right to call witnesses on his behalf and a common-law privilege.

Nonetheless, if *Branzburg* allows protection for journalists when process is used without meeting a legitimate need of the judiciary, the court was correct in its assertion that it has the power to protect a journalist from testifying in the face of sixth amendment claims by the defendant. Defendant's right to process is no greater than that of the court's; he cannot subpoena irrelevant information or depose witnesses who have absolutely no connection with his case. To the extent that considerations of alternative availability and sufficient relevancy may require a judge to rule that the interests of justice do not outweigh the harm posed to the press by requiring disclosure, so the same considerations may be applied to determine that a defendant's case is not significantly harmed by the lack of access to the confidential information.¹⁹¹

The *Cuthbertson I* court also found that the policy grounds for affording the common law privilege to the press in cases treating the disclosure of confidential sources applied with equal force to the "compelled production of a reporter's resource materials."¹⁹² This conclusion seems consonant with the idea that protection will be accorded the press when disclosure of information sought does not meet the "legitimate needs" of the judicial system. Protection is allowed, or denied, based on those needs and not because of the nature of the information sought.

The court noted, however, that "the lack of a confidential source" may affect the balancing process,¹⁹³ a conclusion compelled by the policy for the existence of the privilege. The disclosure of some resource materials simply will not have as much of a deleterious effect on the press as the disclosure of the identities of sources who have been promised anonymity. Short shrift, however, was given to the consideration that the witnesses who were videotaped had waived the privilege with respect to the tape in which they appeared; the court noted simply that the privilege belongs to the press and cannot be waived by someone else.¹⁹⁴ The flaw in the court's reasoning is not

190. "No person . . . shall be compelled in any criminal case to be a witness against himself" U.S. Const. amend. V.

191. See *Cuthbertson III*, 651 F.2d at 196. Though there is a significant theoretical distinction in determining whether the sixth amendment outweighs the privilege in all cases or whether sixth amendment considerations will only be balanced against the privilege, the practical effect of such a distinction is likely to be slight, except in those cases where the information sought is available from other sources. If the information sought is relevant to a defense raised by defendant, it is hard to imagine that such evidence would not be found sufficiently relevant, under any standard, to require that the information be made available to him. But cf. *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429, cert. denied, 419 U.S. 966 (1974) (evidence sought for impeachment purposes in criminal case protected by newsman's privilege). This was recognized in *Cuthbertson I*'s finding that a showing of relevancy within Fed. R. Crim. P. 17(c) is a "sufficient showing to justify production of privileged material to the court for in-camera review," when the information is not available from another source. 630 F.2d at 148.

192. 630 F.2d at 147.

193. *Id.* This undoubtedly was a major factor in requiring the reporter in *Criden* to testify. See *United States v. Criden*, 633 F.2d at 359.

194. 630 F.2d at 147-48.

in its recognition of the party protected. The privilege exists to protect the press in its function of gathering and disseminating news.¹⁹⁵ The problem lies in the court's failure to recognize that such waivers may have a significant impact on the balancing process itself.¹⁹⁶

It seems clear that if a source who has been guaranteed anonymity in exchange for his information voluntarily identifies himself to the court, there is no longer any need for testimonial protection for a reporter. The information sought already has been obtained, and *no harm* is done to the process of news gathering and dissemination. The integrity of the reporter is not called into question; future sources will not be lost because of his testimony. In the same manner, when resource materials are in issue, the first question to be addressed is whether the policy considerations that authorize protection are present. Arguably, when the resource materials reflect the editorial process and when disclosure would tend to inhibit full utilization of that process in the future, there may be a sufficient reason for the court to provide protection.¹⁹⁷ On the facts in *Cuthbertson I*, however, it is difficult to perceive what effect the release of the videotapes¹⁹⁸ would have had on CBS's future ability to gather and disseminate news or on its ability to maintain an atmosphere of vigorous, open discussion of news stories.¹⁹⁹

Finally, the *Cuthbertson I* court found that even *in camera* review of material held by the press may involve first amendment considerations and that production of material for that purpose cannot be made simply for the court's use in determining whether protection should be extended to the material. A preliminary showing is still required as to alternative availability and sufficient relevancy.²⁰⁰ The rationale for this decision appears to be based on the policy underlying the privilege—that disclosure of certain materials may have a chilling effect on future gathering or use of those kinds of materials.²⁰¹ If a court requires disclosure of confidential sources, even to a judge, the reporter's credibility has suffered, as his source is not likely to view *in camera* disclosure as a substitute for the promise of confidentiality.

The *Cuthbertson I* court left open the possibility that a lesser showing of relevancy may be required for *in camera* production than for in-court produc-

195. *Id.*; 612 F.2d at 714-15.

196. The question of waivers arose again in the *Criden* case but was not dealt with directly by the court. See 633 F.2d at 359-60. Judge Rambo would have treated a waiver by the source as dispositive in overcoming the privilege. *Id.* at 360-61 (Rambo, J., concurring).

197. But see *Herbert v. Lando*, 441 U.S. 153 (1979), in which the interests of plaintiff in a libel action against a television network were found to outweigh the potential harm to the editorial process by disclosure.

198. The videotapes contained the verbatim statements of government witnesses whose identities were known and who had indicated by waiver that they had no interest in keeping those statements confidential. 630 F.2d at 143, 147.

199. It would appear that one of CBS's interests in refusing to disclose the requested videotapes was to defend the general principle of press privilege from judicial process, and not to protect itself from the specific harm, if any, caused by the release of the tapes in question.

200. 630 F.2d at 148.

201. See *United States v. Criden*, 633 F.2d at 355-56.

tion. The court stated that meeting the relevancy requirements of rule 17(c)²⁰² is sufficient for *in camera* production;²⁰³ whether a greater showing of relevancy is required to force production to defendants at trial was not decided.²⁰⁴

To the extent that *Riley* and *Cuthbertson I* are compatible with *Branzburg*, they tend to define a federal common-law privilege for journalists, though the nature of the privilege is difficult to define in terms of other evidentiary privileges. When a journalist²⁰⁵ is asked for specific testimony, or is subpoenaed for specific materials, he is entitled under the privilege to ask the court for a protective order releasing him from the requirement of giving that testimony or producing those materials. The court, in deciding whether to grant the protective order, may not exercise its unbridled discretion but must consider the competing interests of the judicial system and a free press, and determine, on the basis of the facts peculiar to the case, whether the journalist's request should be honored.

A two-pronged test should be applied by the court. The court should determine the following: (1) whether the information sought is reasonably available from other sources (if so, disclosure should not be compelled);²⁰⁶ and (2) whether the information sought is sufficiently relevant to the proceedings to justify the potential harm to a free press caused by its compelled disclosure. There is perhaps a third prong to the test—(3) whether the information sought, though relevant, will be of such substantial value to the proceedings as to warrant the strictures of contempt.

Whether this balancing approach is fully adequate to protect the legitimate needs of the press is open to question. For many, as Justice White pointed out in his opinion for the *Branzburg* majority, the only solution to the problem of confidential sources is an absolute privilege.²⁰⁷ Certainly the *Riley-Cuthbertson I* privilege must be seen as unsatisfactory by those sharing that view.

The attempts by courts such as the United States Court of Appeals for the Third Circuit to structure a qualified privilege after the *Branzburg* decision, which might have ended any journalist's privilege,²⁰⁸ reflect a judicial concern

202. Fed. R. Crim. P. 17(c).

203. 630 F.2d at 148.

204. *Id.* at 149. These statements would be available for impeachment "if and when the witness testifies." *Id.* at 144. Such statements would be admissible only if inconsistent with the testimony at trial. If not, then the statements need not be released to defendants under Fed. R. Crim. P. 17(c). The question that remains is how inconsistent the statements must be in order to meet a showing of sufficient relevancy.

In *Cuthbertson III* the Third Circuit Court of Appeals may have acted to restrict the utility of this *in camera* production for the compelling party. The court held that the district court could not, after viewing the material obtained, release that material to the parties without first determining that the material would be admissible as evidence in the case. 651 F.2d at 195.

205. Perhaps other persons qualify for treatment as journalists. See *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977), discussed in note 88 *supra*.

206. See text accompanying notes 157-61 *supra*.

207. 408 U.S. at 702.

208. See *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d 791, cert. denied, 434 U.S. 930 (1977).

for the important place of the press in our society and indicate a conscientious effort to avoid impinging upon areas of potential first amendment problems. Short of an absolute privilege, which *Branzburg* denies,²⁰⁹ this judicial concern may ultimately prove to be the best source of protection for which the press can hope.²¹⁰ The Third Circuit Court of Appeals in *Riley* and in *Cuthbertson I* has attempted to translate this judicial concern into law. To the extent that it has so attempted by reading around the *Branzburg* opinion, its analysis is subject to criticism and reversal. To the extent, however, that it has grafted the policy concerns expressed by a majority of the Supreme Court onto the license to develop federal privileges granted to the courts by Congress, it has made available a basis for further development of a confidential-source privilege that may withstand scrutiny by the Court.

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209. 408 U.S. at 702-03.

210. In North Carolina, for example, there is no record of any reporter ever having been held in contempt of court for refusal to testify, though there have been circumstances in which a contempt order could have been issued (North Carolina has no "shield law"). See Chamberlin, *supra* note 103, at 21.

